

The claimant filed an application for post award medical on June 18, 2007. Claimant sought payment of medical bills and requested that Dr. Mary Beth Miller be

designated the authorized physician. Claimant alleged that his condition had worsened and he suffers chronic pain in both legs and his back due to an antalgic gait. And claimant further alleged he suffers from depression as a natural and probable consequence of his accident. On November 19, 2007, the ALJ authorized Dr. Miller, but respondent could designate an alternative physician, to monitor and prescribe pain medication for claimant's right foot only. The ALJ further ordered that claimant be provided additional diagnostic testing consisting of an MRI of claimant's right knee and low back; referral to a psychologist to determine the extent of and whether claimant's depression is causally related to or aggravated by his accident at work. An order for payment of the medication claimant received for his depression was stayed pending the results of claimant's psychological examination.

The respondent requests review of whether the ALJ erred in finding claimant is in need of medical treatment. Respondent argues claimant's application for post award medical treatment should be denied.

Claimant argues that his need for medical treatment is the natural and probable consequence of his original injury which resulted in a right leg length discrepancy and an antalgic gait. Claimant further argues that Dr. Miller should be authorized for all treatment and referrals. In the alternative, claimant requests the ALJ's Post Award Medical Award should be affirmed. Finally, claimant requests additional attorney fees for services rendered because of the appeal to the Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts of this case were sufficiently detailed in the Post Award Medical Decision and they will not be repeated except as necessary. Claimant's pain has worsened since the regular hearing in this case. Claimant sought additional treatment from Dr. Mary Beth Miller, a physician that he had treated with before the award was entered in this case. Dr. Miller had placed claimant on a pain management program which consisted primarily of medications for his ongoing pain complaints.

At the hearing on claimant's request for post-award medical treatment, the claimant requested additional treatment not only for his right lower extremity but also his left lower extremity and back. He further requested that Dr. Miller be designated the authorized physician to continue to prescribe pain medication. Claimant testified that he was taking methadone, morphine, stool softeners and medication for depression.

Dr. Miller described her role in claimant's treatment as a supportive role because after the accident claimant had been referred to orthopedists. But she continued to

prescribe whatever refills of medications the claimant needed. Dr. Miller provided claimant narcotic pain medication for his right leg pain complaints as well as medication for claimant's depression before the original award was entered in this case. And the back complaints also started in approximately July 2006. Dr. Miller attributed claimant's continued pain in the right leg to the accident. Dr. Miller further opined that claimant's chronic left leg and low back pain was caused by claimant's antalgic gait which, in turn, was caused by the accident. Finally, Dr. Miller opined claimant's depression was a natural and probable consequence of claimant's chronic pain from the accident. But the doctor agreed claimant had been provided medication for depression before the work-related accident. Dr. Miller then noted that the accident contributed to claimant's worsening problems with depression.

At the request of respondent's attorney, Dr. Paul S. Stein examined claimant on October 17, 2007, for reevaluation and an opinion regarding further medical care. Dr. Stein had initially evaluated claimant for a court ordered independent medical examination on January 6, 2006. At that time claimant primarily had a history of treatment for a right heel injury with multiple surgeries. But he also complained of bilateral knee pain and back pain. Dr. Stein had reexamined claimant on August 10, 2006, and provided a 47 percent functional impairment to claimant's right lower leg but Dr. Stein did not find any permanent impairment to the bilateral knees and lower back at that time.

At the examination on October 17, 2007, claimant provided a history of worsening pain in his back, knees and ankles. The doctor noted claimant carried a cane and wears a fixed, plastic AFO splint in his right shoe. Examination revealed claimant has a right-sided limp with poor lift off phase of gait but that claimant can walk on his heels and toes with some difficulty. Dr. Stein noted claimant's lumbar range of motion was full and although claimant noted tenderness to palpation the doctor did not detect guarding or spasm. Dr. Stein did not recommend additional treatment for claimant's right or left ankle.

Dr. Stein noted that, given the severity of claimant's back complaints which contrast with his benign lower back examination, he would recommend a lumbar MRI scan. But the doctor further noted that treatment would only be recommended if the scan reveals definitive structural changes consistent with claimant's complaints. Moreover, the doctor recommended an MRI scan of claimant's right knee because of claimant's persistent complaints. Again, the doctor noted that any treatment recommendations would be dependent upon definitive findings. Finally, Dr. Stein recommended claimant be referred for a psychological evaluation with Dr. Ted Moeller to determine whether the extent claimant's physical complaints are emotional or related to secondary gain and whether there is a significant component of situational depression.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. The controlling issue is whether

claimant's present need for medical treatment for his complaints is directly and naturally related to the July 28, 2003 accident.

Claimant testified his condition has continued to worsen. The claimant's testimony alone is sufficient evidence of the claimant's physical condition.<sup>1</sup> Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.<sup>2</sup>

Claimant has the burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury. Dr. Miller attributes all of claimant's current chronic pain complaints as well as his depression to the original work-related accident. It is significant that Dr. Miller began treating claimant for all of his ongoing complaints well before the original award in this case which ultimately determined claimant only sustained impairment to right lower extremity. Dr. Stein had performed a court ordered independent medical evaluation of claimant before the award was entered and noted that claimant expressed the same complaints of pain then that he now expresses. Nonetheless, Dr. Stein, after his latest examination of claimant, concluded it would be appropriate to conduct further diagnostic testing as well as refer claimant for psychological evaluation.

The ALJ adopted Dr. Stein's recommendations and ordered the diagnostic testing and referral for a psychological evaluation. The ALJ analyzed the evidence in the following manner:

The claimant specifically requested authorization of Dr. Mary Beth Miller to provide treatment to his right foot including payment of prescriptions. The testimony presented made it clear that the claimant believes his back pain, right and left knee pain and left ankle pain is all related to right foot injury, as well as his current need for pain medications and depression medication. From the testimony presented, it is clear that the only treatment Dr. Miller is providing is prescriptions and monitoring thereof. Dr. Stein had seen the claimant previous to the original award and re-evaluated him in anticipation of these proceedings. Dr. Stein stated that he believed the claimant was receiving quite a bit of pain medication for the ankle injury and did not find a cause for the claimant's severe back and right knee pain. Dr. Stein recommended an MRI to the right knee and low back to determine if there was a physical cause for the pain. He further recommended that the claimant be seen by a psychologist to determine the extent of depression, whether there was aggravation of that condition due to the claimant's right foot injury and further, to determine if some of the claimant's pain was psychological. This court finds Dr. Stein to be the most reliable and orders that the testing he recommended, be provided by the respondent and its insurance carrier. The respondent and its

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<sup>1</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

<sup>2</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

insurance carrier shall designate doctors to perform the testing. Dr. Miller will be authorized to monitor and prescribe pain medication. The respondent and its insurance carrier can designate an alternative doctor to perform that function if they so choose.

The Board agrees that claimant has met his burden of proof that he needs additional treatment as a result of the right ankle and foot pain. Accordingly, the Board affirms the ALJ's decision that claimant receive continued treatment for his right foot pain.

The ALJ also authorized additional diagnostic testing consisting of an MRI of claimant's right knee and low back and referral to a psychologist to determine the extent of and whether claimant's depression is causally related to or aggravated by his accident at work. It must be determined whether the Board has jurisdiction to review this portion of the ALJ's Post Award Medical Decision.

Under K.S.A. 44-516, the ALJ is entitled to appoint an independent physician to evaluate the claimant for various reasons. In this case, the ALJ ordered an independent medical examination for an opinion whether additional medical treatment is reasonable, necessary and causally related to the original injury.

The ALJ's decision to have an independent medical examination performed on the claimant is interlocutory in nature and made during the litigation of a worker's compensation case pending before the ALJ. This is not a final order that can be reviewed pursuant to K.S.A. 44-551. Neither is this an order entered pursuant to the preliminary hearing statute K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing medical treatment and payment of temporary total disability compensation. The Order pertains to an interlocutory matter, ordering an independent medical examination, over which an ALJ has authority to order during the litigation of the case.

Because the Act specifically grants an ALJ the authority to appoint neutral health care providers to evaluate injured workers<sup>3</sup>, the Judge did not exceed her jurisdiction and authority by ordering the evaluation.

The Board's jurisdiction to review appeals is governed by K.S.A. 44-534a and K.S.A. 44-551. Those statutes grant the Board the jurisdiction to review: (1) certain preliminary hearing findings; and, (2) final orders and awards. Neither statute grants the Board the authority to review the interlocutory order now in issue.

In this case, the ALJ ordered an independent medical examination to determine if additional treatment is reasonable, necessary and related to the underlying injury. In essence, the post award proceeding is ongoing. The Board is without jurisdiction to review

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<sup>3</sup> See K.S.A. 44-510e and K.S.A. 44-516.

this portion of the ALJ's Post Award Medical Decision. Accordingly, this portion of the appeal is premature as the ALJ has not decided the issue respondent is appealing.

Lastly, in claimant's brief to the Board, claimant's attorney requested additional attorney fees. The time was spent preparing for the Board review. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. This would include the request for additional attorney fees in connection with this review. Accordingly, the request for additional attorney fees is remanded to the ALJ for further proceedings, if necessary, regarding the request for additional attorney fees.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Post Award Medical Award of Administrative Law Judge Pamela J. Fuller dated November 19, 2007, awarding additional medical treatment for claimant's right foot pain is affirmed but the appeal is dismissed as premature regarding the decision referring claimant for additional medical diagnostic testing.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge